

Lang (Migration) [2017] AATA 2290 (8 November 2017)

DECISION RECORD

DIVISION: Migration & Refugee Division

REVIEW APPLICANT: Mrs Thi Ngoc My Lang

VISA APPLICANTS: Mr Thiet Lap Dang
Mr Vu Hong Anh Dang
Mr Vu Van Anh Dang

CASE NUMBER: 1620714

DIBP REFERENCE(S): OSF2016/038118

MEMBER: Peter Emmerton

DATE: 8 November 2017

PLACE OF DECISION: Adelaide

DECISION: The Tribunal remits the applications for Partner (Provisional) (Class UF) visas for reconsideration, with the direction that the first named visa applicant meets the following criteria for a Subclass 309 (Partner (Provisional)) visa:

- cl.309.211 of Schedule 2 to the Regulations
- cl.309.221 of Schedule 2 to the Regulations
- The Tribunal finds that the secondary applicants' applications should be considered in the context of the delegate's decision regarding the primary applicants satisfying the remaining criteria for a subclass 309 visa decision.

1. Statement made on 08 November 2017 at 11:16am

CATCHWORDS

Migration – Partner (Provisional) (Class UF) visa – Subclass 309 (Partner (Provisional)) – Genuine spousal relationship – Financial independence – Vietnamese social customs – Brief relationship prior to marriage – Brief cohabitation – Representation of relationship to others – Non-traditional wedding ceremony – Remarriage shortly after widowing

LEGISLATION

Migration Act 1958, ss 5F, 65

Migration Regulations 1994, r 1.15A, Schedule 2, cl 309.211, cl 309.221

CASES

Minister of Immigration, Local Government and Ethnic Affairs v Dhillon [1990] FCA

2. 144

3.

4.

5.

6.

•

7.

STATEMENT OF DECISION AND REASONS

APPLICATION FOR REVIEW

8. This is an application for review of a decision made by a delegate of the Minister for Immigration on 26 October 2016 to refuse to grant the visa applicants Partner (Provisional) (Class UF) visas under s.65 of the *Migration Act 1958* (the Act).
9. The first named visa applicant (the visa applicant) Mr Thiet Lap DANG, applied for the visa on 20 January 2016 on the basis of their relationship with their sponsor, the review applicant Ms Thi Ngoc My LANG. At that time, Class UF contained only one subclass: Subclass 309 (Partner (Provisional)). The criteria for the grant of this visa are set out in Part 309 of Schedule 2 to the Migration Regulations 1994 (the Regulations). The primary criteria must be satisfied by at least one applicant. Other members of the family unit, if any, who are applicants for the visa need satisfy only the secondary criteria. Relevantly to this matter the primary criteria include cl.309.211(2).
10. The delegate refused to grant the visa on the basis that the visa applicant did not satisfy cl.309.211(2) because the delegate was not satisfied that the couple were in a genuine spousal relationship.
11. The review applicant appeared before the Tribunal on 7 November 2017 to give evidence and present arguments. The Tribunal also received evidence from three witnesses. The three witnesses included the sponsor's daughter, Ms Phuong Quach, a co-worker and friend of the sponsor, Ms Lan Duong and a long term friend of the applicant, Mr Thanh Quoc. The review applicant was represented in relation to the review by her registered migration agent.
12. For the following reasons, the Tribunal has concluded that the matter should be remitted for reconsideration.

CONSIDERATION OF CLAIMS AND EVIDENCE

13. The issue in the present case is whether the couple are in a genuine spousal relationship as defined by section 5F of the Act.

WHETHER THE PARTIES ARE IN A SPOUSE OR DE FACTO RELATIONSHIP

14. Clause 309.211(2) and 309.221 require that at the time the visa application was made, and at the time of this decision, the visa applicant is the spouse or de facto partner of an Australian citizen or Australian permanent resident or an eligible New Zealand citizen. In the present case the visa applicant claims to be the spouse of the review applicant who is an Australian citizen.
15. 'Spouse' is defined in s.5F of the Act and provides that a person is the spouse of another where the two persons are in a married relationship. Persons in a married relationship must be married to each other under a marriage that is valid for the purposes of the Act, there

must be a mutual commitment to a shared life as husband and wife to the exclusion of all others, the relationship must be genuine and continuing, and the couple must live together, or not live separately and apart on a permanent basis: s.5F(2)(a)-(d). In forming an opinion about these matters, regard must be had to all of the circumstances of the relationship. This includes evidence of the financial and social aspects and the nature of the visa applicant's and review applicant's household and their commitment to each other as set out in r.1.15A(3), which is extracted in the attachment to this decision.

ARE THE PARTIES VALIDLY MARRIED?

16. If the parties are validly married, they may meet the requirements of a spousal relationship, but not a de facto relationship. The parties presented a Commonwealth of Australia Marriage Certificate, Registration number 20190685, dated 6 October 2015. On the evidence, the parties were married to each other under a marriage that is valid for the purposes of the Act as required by s.5F(2)(a).

ARE THE OTHER REQUIREMENTS FOR A SPOUSAL RELATIONSHIP MET?

17. In forming an opinion whether they are in a spousal relationship consideration must be given to all of the circumstances of the relationship. This includes evidence of the financial and social aspects, the nature of the visa applicant's and review applicant's household and their commitment to each other as set out in r.1.15A which is attached to this decision.
18. The applicant lodged a valid application for a Class UF Partner (Provisional) and BC Partner (Migrant) visa on 20 January 2016 on the grounds of being in a spousal relationship with an Australian citizen, Ms LANG. Ms LANG was awarded Australian citizenship on 30 September 1998.
19. The applicant is a 49 year old male from Nam Dinh province. He declares he was married with his first wife until her death in January 2015. There are two children from this relationship, both of whom are included in this application.
20. The sponsor Ms LANG is a forty four year old Australian citizen, living in Parafield Gardens, South Australia. She declared that she divorced her first husband in 2004 and there are two children from this relationship.
21. She also declared that she ended the de facto relationship with her second partner in 2010. There is one child from this relationship.
22. According to information on file and provided at interview with the department, the parties were first introduced by a relative of the visa applicant's late wife.
23. The visa applicant's late wife died 31 January 2015.
24. The couple first met when the sponsor travelled to Vietnam on 15 April 2015. They spent time together with the applicant's children and the sponsor's relatives in Ho Chi Minh City and in Can Tho.
25. They declared their love for each other after two weeks of courtship and the sponsor returned to Australia on 7 May 2015.
26. The applicant visited the sponsor on 10 August 2015 and proposed marriage around the end of September 2015.

27. The couple held a simple, non-traditional ceremony at a restaurant on 6 October 2015 and the applicant returned to Vietnam on 25 October 2015.
28. The application was lodged on 20 January 2016.
29. Department records indicate the sponsor has travelled once to Vietnam following the couple's wedding, from 18 August 2016 until 15 September 2016. The records also indicate that the applicant has not travelled to Australia since the time of the couple's wedding, having returned to Vietnam on 25 October 2015.
30. The Tribunal has considered the documentary evidence provided to the Department and the Tribunal. The Tribunal, as previously stated has had the benefit of taking oral evidence from three witnesses and the sponsor at the hearing. The visa applicant was unable to present oral evidence due to communication technical difficulties. He had however previously made a detailed written statement to the Tribunal, which was cross referenced with witness statements in the hearing. The Tribunal found all those presenting evidence to be credible and persuasive witnesses. Answers were provided in what appeared to be an honest and candid fashion without any apparent obfuscation or collusion. The Tribunal has considered all aspects of the relationship.
31. In relation to the financial aspects of the relationship between the applicant and the sponsor, the Tribunal has considered joint asset ownership, joint liabilities, pooling of financial resources, legal obligations and the sharing of daily household expenses. The delegate was not satisfied that this element of a spousal relationship was proved, as no financial evidence was presented. When questioned, the sponsor stated that she did not send money to her husband. She also stated that he sent some money to her, occasionally, when she needed it and he also sent her gifts. This is not concerning to the Tribunal as the applicant owns and rents two houses and leases out two noodle businesses in Vietnam, this demonstrates that he is financially independent of the sponsor. His business holdings listed in his statement to the Tribunal were confirmed by the sponsor and two of the witnesses. The sponsor works part-time as a nail technician and receives Centrelink, child support payments. These circumstances were also known by the visa applicant.
32. There is no other evidence of financial, legal liability or asset interrelationship between the couple. This is not surprising as they live in separate countries, have independent incomes and are both running households with dependent children. The Tribunal places little weight on this evidence.
33. When assessing the nature of the household the Tribunal has considered the domestic living arrangements, shared household duties, daily routines and caring for children. The Tribunal notes that the couple have had only two brief periods of co-habitation following their wedding. This is in-line with Vietnamese customs. The Tribunal also notes that the couple need to consider the needs of their respective family members in regards to their education and the impact that the cost and timing of family travel may have.
34. Additional photos were provided to the Tribunal. They demonstrate family visits, meetings with immediate family members such as the sponsors mother and sister, blended family occasions and day to day activities including dining in the sponsor's home with her children and shopping for groceries. The Tribunal places moderate weight on this evidence.
35. In assessing the social aspects of the relationship, the Tribunal has considered social interactions, evidence of joint social activities, representation of their relationship to others and recognition of the relationship by friends and family. The delegate was not satisfied that the couple had demonstrated a sufficient level of socialisation. The evidence presented by

the three witnesses in the hearing clearly established that the couple were recognised as husband and wife within their social circle and families.

36. The sponsor's daughter spoke eloquently about her step-father, his positive qualities and how he treated her mother, as a gentleman should. This made both her and her mother happy. The witness contrasted this with her mother's previous relationships and the fact that those experiences had encouraged her to consider practising in Family Law upon completion of her current law degree. The Tribunal found the frank nature of this evidence compelling.
37. The Tribunal questioned the sponsor extensively about the non-traditional wedding which she and her husband undertook. A simple wedding with only immediate family and minimal guests in Australia without a ceremony for friends and family in Vietnam. This would be considered unusual by traditional Vietnamese customs. The sponsor acknowledged this and went on to say that at this stage of their lives and both having experienced previous traditional marriage ceremonies felt it was not necessary. The sponsor's immediate family attended the wedding. The Tribunal notes that the sponsor had previously lived in a de facto relationship, this suggests non-adherence to traditional Vietnamese norms. The Tribunal also notes that the sponsor's mother is senior in years and lives in Vietnam, this would have made her travel to Australia difficult. The couple visited her and her daughter after the wedding.
38. The sponsor acknowledged that the circumstances around their marriage were further complicated by the visa applicant breaking with North Vietnamese tradition and remarrying shortly after his first wife's death. This was previously commented upon in the visa applicant's written statement to the Tribunal. He explained that he was not able to tell family and friends of his remarriage and introduce his prospective wife prior to the marriage, as he believed that the union would not have been accepted. Post marriage the sponsor has travelled to Vietnam and met family and friends and she stated that their marriage has been accepted by the community. The Tribunal places substantial weight on this evidence.
39. When assessing the nature of the persons' commitment to each other the Tribunal has considered the relationship development, how long they have lived together and whether the relationship is viewed by them as long term. The delegate was not satisfied that this was a genuine spousal relationship in part due to the rapid development of the relationship which followed an introduction. This concern was further exacerbated by the fact that the visa applicant's deceased wife's sisters live in Australia. The Tribunal notes that introduced marriages are a common feature of Vietnamese marriage traditions. It also hypothesises that being reunited with relatives from a previous marriage, may not be any greater motivator than maintaining direct familial relations in his country of origin.
40. The Tribunal is aware that people enter marriages for a variety of reasons with a range of motivations, which may evolve over time.

In *Minister of Immigration, Local Government and Ethnic Affairs v Dhillon* [1990] FCA 144, Northrop, Wilcox and French JJ unanimously stated [at 11]:

"The primary judge referred in his reasons to the concept of marriage in Australian law, citing the remarks of Street C.J. in R. v. Cahill (1978) 2 NSWLR 453 at p 458. As his Honour there pointed out, people enter marriages with a variety of purposes and motives, hopes and anticipations, so that it is not possible to classify some purposes etc. as according to what may be described as 'community expectations'. It is not necessarily inconsistent with a genuine marriage relationship that it was entered into by one or both parties with a view to

material benefit or advancement, as for example with the hope of becoming eligible to reside in a particular country. The true test, we would suggest the only test, is whether at the time at which the matter has to be decided it can be said that the parties have a mutual commitment to a shared life as husband and wife to the exclusion of others."

41. Whilst the relationship may have commenced as a direct result of an introduction, there has been substantial evidence proffered suggesting their relationship has evolved. The evidence provided by statement from the visa applicant coupled with the frank evidence from the sponsor reassured the Tribunal that this is perceived by them as a genuine spousal relationship. The Tribunal was further reassured by the corroborative evidence given by the three witnesses in the hearing. Of particular note, were the frank, positive and supportive observations of the sponsor's teenage daughter.
42. A substantial amount of information had been provided by the visa applicant, prior to the hearing, in his written statement to the Tribunal. He clearly articulated plans for his co-joined family, their living arrangements and future employment and business plans. His statements correlated with evidence provided by the sponsor and the witnesses. The Tribunal places substantial weight on this evidence.
43. For the above reasons, the Tribunal is satisfied that at the time of application and at the time of decision, the visa applicant and the review applicant were in a genuine and continuing relationship, and had a mutual commitment to a shared life to the exclusion of all others, and lived together, or not separately and apart, on a permanent basis.
44. On the basis of the above the Tribunal is satisfied that the requirements of s.5F(2) are met at the time the visa application was made and the time of this decision.
45. Therefore the visa applicant meets cl.309.211 and cl.309.221.
46. As the delegate found that the primary applicant did not meet the legislative requirements specified in cl.309.211(2), the secondary applicants were unable to satisfy cl.309.321(a).
47. The Tribunal therefore finds that the secondary applicants' applications should be considered in the context of the delegate's decision regarding the primary applicants satisfying the remaining criteria for a subclass 309 visa decision.
48. Given the findings above, the appropriate course is to remit the application for the visa to the Minister to consider the remaining criteria for a Subclass 309 visa.

DECISION

49. The Tribunal remits the applications for Partner (Provisional) (Class UF) visas for reconsideration, with the direction that the first named visa applicant meets the following criteria for a Subclass 309 (Partner (Provisional)) visa:
 - cl.309.211 of Schedule 2 to the Regulations
 - cl.309.221 of Schedule 2 to the Regulations
 - The Tribunal finds that the secondary applicant's applications should be considered in the context of the delegate's decision regarding the primary applicants satisfying the remaining criteria for a subclass 309 visa decision.

Peter Emmerton
Member

ATTACHMENT - Extract from Migration Regulations 1994

1.15A Spouse

- (1) For subsection 5F (3) of the Act, this regulation sets out arrangements for the purpose of determining whether 1 or more of the conditions in paragraphs 5F (2) (a), (b), (c) and (d) of the Act exist.
- (2) If the Minister is considering an application for:
 - (a) a Partner (Migrant) (Class BC) visa; or
 - (b) a Partner (Provisional) (Class UF) visa; or
 - (c) a Partner (Residence) (Class BS) visa; or
 - (d) a Partner (Temporary) (Class UK) visa;the Minister must consider all of the circumstances of the relationship, including the matters set out in subregulation (3).
- (3) The matters for subregulation (2) are:
 - (a) the financial aspects of the relationship, including:
 - (i) any joint ownership of real estate or other major assets; and
 - (ii) any joint liabilities; and
 - (iii) the extent of any pooling of financial resources, especially in relation to major financial commitments; and
 - (iv) whether one person in the relationship owes any legal obligation in respect of the other; and
 - (v) the basis of any sharing of day-to-day household expenses; and
 - (b) the nature of the household, including:
 - (i) any joint responsibility for the care and support of children; and
 - (ii) the living arrangements of the persons; and
 - (iii) any sharing of the responsibility for housework; and
 - (c) the social aspects of the relationship, including:
 - (i) whether the persons represent themselves to other people as being married to each other; and
 - (ii) the opinion of the persons' friends and acquaintances about the nature of the relationship; and
 - (iii) any basis on which the persons plan and undertake joint social activities; and
 - (d) the nature of the persons' commitment to each other, including:
 - (i) the duration of the relationship; and
 - (ii) the length of time during which the persons have lived together; and
 - (iii) the degree of companionship and emotional support that the persons draw from each other; and
 - (iv) whether the persons see the relationship as a long-term one.
- (4) If the Minister is considering an application for a visa of a class other than a class mentioned in subregulation (2), the Minister may consider any of the circumstances mentioned in subregulation (3).